

WRIT PETITION NO. 1814 of 2004

IN THE MATTER OF:

An application for direction.

AND

IN THE MATTER OF:

Bangladesh Paribesh Andolon (BAPA) and another.

.....Petitioners

Versus

Bangladesh and others

.....Respondents

Mr. Fida M. Kamal, Sr. Advocate with
Mrs. Sara Hossain, Advocate

.....For the petitioner-applicants

Mr. Mahbubey Alam, Attorney General,
With

Mr. Md. Motahar Hossain, DAG

Mr. Samarendra Nath Biswas, AAG

Ms. Purabi Rani Sharma, AAG

.... For the respondent No.3 & 9

Mr. M. Quamrul Hoque Siddique,

... For the respondent No.8

Present:

Mr. Justice M. Moazzam Husain

And

Mr. Justice Md. Badruzzaman

Order dated 13.07.2014

This is an application for direction to be issued to the respondents to remove all unauthorized structures standing on the Dhanmondi playground situated between Dhanmondi Road No.8 and Road No.9 in the Dhanmondi residential area and to report compliance to this court.

The instant writ petition was brought by the present applicants ie, *Bangladesh Paribesh Andolon* and another, in the year 2004 seeking declaration as to why using the Dhanmondi playground for any purpose other than as playground shall not be declared to be without lawful authority and is of no legal effect and also seeking a direction to demolish the unauthorized semi-*pacca* sheds constructed therein. The applicants felt the necessity of the relief as they found the playground occupied

most of the year, amongst others, by event organizers in the name of holding different *mela* (fair) in disregard of the main purpose of the ground.

A Division Bench of this Division heard the petition and finally made the rule absolute by its judgment and order passed on 15.3.2011 with a direction to remove all structures from the playground, except those used for the purpose of genuine sports, within 15 days from date and report compliance by an affidavit. The direction made was in the nature of continuing mandamus. Accordingly, the matter subsists and the instant application is made in connection with the writ petition on some subsequent developments relatable to violation of the court's direction.

The case of the applicants, in brief, is that as per Dhaka city plan the space between Dhamondi Road No.8 and 9 is a public park/playground. This public park was handed over to the Dhaka City Corporation by the Ministry of Public Works in 1984. The certificate testifying handover identifies the park as "a playground and park comprising an area more or less 13 bigha 12 katha and 10 chatak". Early 2014 it was suddenly noticed that construction works were carried out in the playground purportedly by the Local Government Engineering Department (LGED). The construction included erection of a new boundary wall, a gate with name of Respondent No.8, a private company, inscribed therein. Four-five one-story sheds (in addition to the three semi *pacca* sheds which were the subject-matter of the writ petition) were made in which some twenty persons appear to be living. There also appeared to be other ongoing constructions works including one basketball court, two tennis and two badminton courts altogether covering one third of the whole area. The applicants further learnt to their dismay, that Respondent No.8, had been employing uniformed private guards round the clock at the entrance of the ground and was controlling/ restricting the access of the general public into the ground. A banner was found hung containing the words-"*Construction of playing court at Lt. Sheikh Jamal Dhanmondi Club Ltd. under Dhaka South City Corporation, Dhaka*".

Pursuant to an application for information Dhaka City Corporation issued a report suggesting, *inter alia*, that the Corporation had not granted any permission to respondent- club to perform any kind of activity on the Dhanmondi playground. In the meantime Director of Administration, RAJUK, had issued a letter dated 9.4.14 purporting to direct the Chief Engineer, LGED to take necessary steps under section 3 of the Building Construction Act in relation to any construction that has been made on the ground. A writ petition No. 3793 of 2014 was filed by the applicants impugning, amongst others, the inaction of the respondents in respect of removal of unauthorized constructions on the playground. During the pendency of the said writ

petition respondents, however, put down the earlier notice and put up a new notice board containing the words: “ Dhanmondi playground is open for all” thus opening the ground for all.

Although the playground is now open to the public and residents alike the construction works have been continuing unabated. This is a flagrant breach of the order of the Hon’ble Court. The structures, especially 4/5 semi *pacca* sheds, made in the playground in addition to original three are not relatable to genuine sports as meant in the judgment. The respondents not only failed to prevent unauthorized structures being raised but also permitted unauthorized construction of basketball, tennis and badminton courts to be made therein. According to the applicants, even if the basketball, tennis and badminton courts are attributable to genuine sports they cannot, as per law, take more than 5% of the total area of the park.

The applicants have also filed contempt petition, Contempt Petition No. 164 of 2013, alleging violation of the court’s order in which rule has been issued by a Division Bench of this Division which is still pending for hearing.

The Respondent Nos. 3 and 8 appeared and contested the application by filing their respective affidavits-in reply wherein they denied all the allegations made by the applicants in their material particulars. Added Respondent No.9 (LGED) also filed affidavit in its defense substantially clarifying their position and denying allegations of violation of the court’s order.

Mr. Fida M Kamal learned Counsel appearing for the applicant extensively argued portraying the scenario how unauthorized constructions of semi-*pacca* sheds did spring up in the playground over the decades defying law and the master plan of the city; how the playground slid into abuse; how the playground finally fell into abuse at the hands of some unscrupulous event organizers who started holding different monsoon *mela* therein practically occupying the same most of the year to the deprivation of the local residents and their children. At one stage, as he pointed out, the present applicants were compelled to take recourse to law and filed the instant writ petition in 2004. They finally won the legal battle and obtained the aforementioned declaration and direction from the court. But the story did not end there. Latterly, new development began to show up: a private company suddenly emerged in place of the Club, number of semi-*pacca* structures grew in the ground, constructions of basketball, tennis and badminton courts appeared to have been carried out covering a considerable portion of the playground. It subsequently

transpired that the constructions were being made with public money sanctioned by the Government.

Mr. Fida M Kamal pointedly questioned the role of the Respondent No. 9 in making sanction of public money in the name of a private company for constructions of the sport courts. He made it clear and reaffirmed with emphasis that they have no objection whatsoever to the name given to the club but this time this is a 'registered company' formed by some persons, mostly non-residents of Dhanmondi, with its own objectives having hardly anything to do with the promotion and maintenance of the ground as it is meant in the master plan. The move taken, he stressed, will not only bring about a paradigm shift in the nature and purpose of the ground in violation of law and the master plan but also leave the ground to the control of the company to the detriment of free access to and use of the same by the local residents and their children far less the general public. Mr. Fida Kamal contended that it is the failure on the part of the respondent to protect and preserve the playground and to a much extent it is their indulgence that paved the way for unauthorized construction and dispossession of the playground so desperately needed by local residents as the only open space for their children's recreation. Down the line a direction is sought asking the respondent to remove the unauthorized constructions from the playground and to allow the same to be used as earmarked in the master plan.

Mr. Mahbub-e-Alam learned Attorney General, in his bid to assail the submissions of Mr. Fida Kamal bounced back in a dismissive gesture and asserted that nothing is done in violation of the court's order nor does the question at all arise so to do. He firstly questioned the *bona fide* of the applicants who, according to him, chose to remain silent in the past over many grave environmental issues, but now have turned up-and-doing in a matter which is no issue at all. He stressed that the semi- *pacca* sheds that were made at the periphery of the ground were already removed and the tennis and other courts that were being constructed is fairly relatable to 'genuine sports' as contemplated in the judgment of the court and they are in no way derogatory to the character and original purpose of the playground. He explained in so many words the nature of construction that was going in the playground and how the same is in keeping with the direction of the court. Mr. Attorney General stressed in no uncertain terms that none other than the Government and concerned public bodies are in control of the playground. None has closed the playground for the residents or the public as is sought to be canvassed by the applicants. To a question about turning the club into a company learned

Attorney General said that the issue raised here is not about company. It is, therefore, futile to embark upon the question of formation, registration or nature of a company.

Mr. Quamrul Haque Siddique, learned Advocate appearing for Respondent No. 8 traced the history of Dhanmondi Club, its deplorable condition in terms of maintenance as well as abuse so much so that people of taste felt like avoiding the ground not to speak of sending their children there. The general meeting of the Club, a voluntary association, took decision to incorporate the same in order that effective measures could be taken to bring the playground back on track and make it worth the name by upgrading and diversifying the opportunities of sports. In keeping with the initiative the Ministry found it advisable for public interest to extend the facilities and diversify the scope of sports events and took up the construction of a number of sport courts such as tennis, basketball and badminton courts. Respondent No.8 has nothing to do with the government initiative so taken nor has the respondent closed the playground for the general public. The application, according to him, is misconceived as being deficient of information, therefore, is liable to be rejected.

As the statements made, a writ petition filed weeks ago is still pending broadly over the same issue. A contempt petition is also filed by the applicants against the respondents in which a Division Bench has already issued rule asking the respondents to show cause as to why a contempt proceedings shall not be drawn against them for alleged violation of the direction of the court. Over and above, continuing *madamus* is there perpetually operating upon the respondents as continuing mandate to remove all structures from Dhanmondi playground except those used for the purpose of genuine sports which means by necessary implication that the respondents must remove the obstacles from the playground and maintain the same as directed by the court. All the potential breach, therefore, are supposed to come within the mischief of the pending direction and would be punishable for contempt leaving no scope for fresh application seeking another direction to remove the obstacles which remains to be mere incidental to the contempt petition to be given as consequential relief.

In the peculiar context we raised the question why in presence of a continuing mandate another direction is needed. One direction generally does not follow another on the issue curable under the earlier if the earlier is still in operation. Relief might well be sought in the pending contempt proceedings. Mr. Fida M. Kamal responded to our reservation saying that the contempt court is only meant to

punish not to cure, therefore, a fresh direction would be needed to remove the unauthorized constructions. The proposition virtually sought to be canvassed by Mr. Fida Kamal implies that for every breach of the kind there must be at least two applications: one for direction to cure the wrong and other seeking proceedings for contempt. We are unable to accept the proposition for a number of reasons.

In the first place, the proposition canvassed by Mr. Fida M Kamal, runs contrary to the nature and purpose of continuing mandamus in that continuing mandamus remains pending unless concluded by an express order so as to facilitate the court to oversee that the directives are carried into effect or else to take action necessary to compel the compliance. It follows as a logical corollary that in case of continuing mandamus court is continually sitting on the issue and mere allegation of breach of order of directives made in the form of contempt petition is enough to set the ball on motion. Once the machinery of law is so set on motion it becomes incumbent upon the court to proceed against the contemnor without waiting for an application for direction. In that event direction turns to be mere incidental to the contempt petition and is given as a consequential relief. Secondly, there is no law, express or implied, suggesting that the court which can grant substantive relief cannot give consequential or incidental relief and another court is needed for the purpose. Thirdly, High Court Division, in exercise of its constitutional jurisdiction, is clothed with power to pass any order required for giving full effect to its order or directives. By the same token, this court is competent to pass orders/directives granting consequential relief in a contempt proceedings. To say otherwise is to put unnecessary limitation on the jurisdiction of the court not explainable upon any sound proposition of law. Finally, such a proposition is against public policy as is prone to create multiplicity of litigations and seeks to impose limitation on the jurisdiction of the High Court Division which is inherent in it. Our view lends support from the legal maxim- "*Quando lex aliquid concedit concedere videtur ut illud sane quo res ipsa ease non potest*" meaning –“whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect.”

The maxim found expression in innumerable cases. Reference may be made to the cases of *Dulal Chanda Bhar v Sukumar Banerjee*, AIR 1956 Cal474; *Saibal Kumar Gupta v BK Sen*, AIR 1959 Cal 106; *Md. Idris v Rustam Jehangir Sapuji*, AIR 1984 SC 1826 and *Noorali Babul Thanewala v Shri KMM Setti*, AIR 1990 SC 464 in which similar view is taken by the superior courts of Indian jurisdiction. Taking cue from the aforesaid cases Calcutta High Court in *Sunil Kumar Ghose v State of west Bengal*, 1995 Cr. L. J. 2179 (Cal) held as under:

‘There could clearly be no mistaking that in a contempt application the court is competent to issue necessary further and consequential direction for enforcing the order.’

We could not lay our hands on a single case in which fitness of things required incidental/consequential relief in a contempt proceedings but the court declined to grant them.

Back in our jurisdiction, in *Farooque Hossain (Md.) v Iqbal Hossain (M)* reported in 8 BLC 204 a Division Bench of this Division awarded punishment for contempt as well as directed them to give the petitioner promotion to the post of Superintending Engineer.

We, therefore, conclude that the remedy in this case lies in contempt proceedings already initiated by the applicants and this application is redundant and not maintainable.

Since this application failed to stand the maintainability-test we refrain from making our comments on the merit of the cases canvassed by the parties.

This application, accordingly, is rejected. There shall, however, be no order as to cost.